

Abacus Fed. Sav. Bank v Lim

2009 NY Slip Op 31832(U)

August 13, 2009

Supreme Court, New York County

Docket Number: 108378/03

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jane S. Solomon
Justice

PART 55

Index Number : 108378/2003
ABACUS FEDERAL SAVINGS
VS.
LIM MEE JOHN CAROL
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. 108378/008³

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-3
4-5
6-7

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

NB: Compliance Conference on October 5, 2009 at noon.

FILED

AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/09

Jane S. Solomon J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ABACUS FEDERAL SAVINGS BANK

Index No. 108378/03

Plaintiff,

-against-

CAROL JOHN MEE LIM,

FILED
AUG 17 2009
COUNTY CLERKS OFFICE
NEW YORK

DECISION and ORDER

-----X
JANE S. SOLOMON, J.S.C.:

Plaintiff Abacus Federal Savings Bank (the "Bank") was defrauded of over nine million dollars through a series of illegal transactions orchestrated by one of its employees, defendant Carol John Mee Lim ("Lim").

Lim was a manager of the Bank's Canal Street branch. In 2003, the Bank's Chief Internal Auditor investigated bounced checks written by Lim's husband to a commercial customer of the Bank: In March 2003, Lim met with the Bank's President. She confessed that "she had done something wrong" and "begged for [his] forgiveness." (Complaint ¶¶ 37-38.) She stated that she had "touched" certain accounts belonging to family and friends and promised to "give all the money back." (Complaint ¶¶ 40-41.)

The Bank fired Lim and notified the FBI, which took over the investigation on April 13, 2003. (Complaint ¶¶ 71-73.) On April 22, 2003, a criminal complaint was filed against her, but Lim fled before she could be arrested. (Complaint ¶¶ 80, 102-103.)

In this action, plaintiff sued Lim, her sister, defendant Frances Eng ("Eng"), and others who allegedly participated in the fraud. Eng answered, but several defendants, including Lim, did not, resulting in a default judgment against them, jointly and severally, in the amount of \$9,161,633.81. That sum was fixed at an inquest held on April 8, 2004 pursuant to the order granting judgment on default; Eng was represented by counsel at the inquest. (Judgment, attached as Exh. B to Affidavit of Jill Sung.)

A 2007 indictment charged Eng with "unlawfully, willfully, and knowingly" conspiring to violate 18 U.S.C. 1344. The indictment alleged that Eng and others executed "a scheme and artifice to defraud a financial institution . . . by means of false and fraudulent pretenses, representations and promises." (Indictment, attached as Exh. B to Reply Affirmation of Scott A. Levin, sworn to April 30, 2009.) The indictment alleged that Eng committed overt acts in furtherance of the conspiracy by writing checks that were used in the fraudulent scheme.

On September 28, 2007, Eng pleaded guilty to conspiracy to commit bank fraud under 18 U.S.C. 1344. (Affidavit of Frances Eng ¶ 10.) Eng was sentenced to fifteen months in prison and was ordered to pay \$160,000 in restitution in monthly installments after her release. The Bank does not submit a transcript of Eng's allocution, but Eng concedes that she admitted writing and endorsing three checks made out to Best Choice from Tiffany

Entertainment Group without authority to do so.

The Bank now moves for summary judgment against Eng. As against Eng, the Complaint asserts causes of action for: (a) conversion; (b) constructive trust; (c) restitution; (d) unjust enrichment; (e) conspiracy, and (f) an accounting. Although only Lim was sued for fraud, in the conspiracy cause of action, it is alleged that Eng worked with others to "defraud the Bank and its customers" and "aided, abetted, acted in concert, and/or acted in common plan with each other through an express or tacit agreement to embezzle and defraud the Bank and its customers." (Complaint ¶¶ 269-70.) The Bank alleges that Eng participated in the conspiracy by writing checks from her personal and business account to Bank customers to try to help Lim replace embezzled funds. (Complaint ¶¶ 138-39.)

The Bank seeks summary judgment by a notice of motion that does not identify upon which claim against Eng relief is sought. The Bank argues that Eng is collaterally estopped because of her guilty plea from denying her liability and seeks \$9,161,633.81, the amount of the default judgment awarded against the others, from her. In opposition, Eng contends that her guilty plea to the criminal conspiracy charge alone does not show that the elements of any particular claim asserted against her in the Complaint have been satisfied, and that she should not be responsible for the entire multi million dollar loss when she was only ordered to pay \$160,000 in restitution.

Notably, New York does not recognize an independent cause of action for conspiracy to commit a civil tort. See *Romano v. Romano*, 2 A.D.3d 430, 432 (2nd Dept. 2003) ("a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort"). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Under the circumstances, the Bank must be put to its proof on the separate claims against Eng and this motion must be denied.

Accordingly, it hereby is

ORDERED that the Bank's motion for summary judgment is denied; and it further is

ORDERED that the parties shall appear for a compliance conference in Part 55 at 60 Centre Street on October 5, 2009 at 12:00 p.m. to schedule such further proceedings herein as may be appropriate. Plaintiff shall notify any other ^{appearing} defendant.

Dated: August 13, 2009

ENTER.

J.S.C.

JANE S. SOLOMON

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK